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No. 276.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

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STATEMENT.

On May 14, 1898, the claimant was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary service during the war with Spain. On June 1, 1898, he reported for duty on the U. S. S. *Massachusetts*, in obedience to orders issued by the Navy Department, and served creditably as such officer on said vessel until December 17, 1898, at which time he was detached and ordered to his home. On December 22, 1898, he was honorably discharged from the naval service.

The U. S. S. *Massachusetts* was in commission and cruised beyond the limits of the United States (in

Cuban waters) during the time the claimant served on board said vessel. In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the Treasury two months' pay at the rate of pay of an assistant engineer in the Navy "on waiting orders."

While doing sea service beyond the limits of the United States, claimant was entitled to and received pay at the rate of $1,700 per annum. While he was on leave or waiting orders he was entitled to pay at the rate of $1,000 per annum, which is the leave or waiting pay of an officer of his rank. He was on leave or waiting-orders pay from December 17 until December 22, 1898, a period of five days.

The act of March 3, 1899 (30 Stat. L., p. 1228), among other things, provides as follows:

> The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay.

The claimant was paid $166.66 as two month's extra pay under the foregoing statute, which payment was based on the leave pay of an assistant engineer, to wit, at the rate of $1,000 per annum. He contends that he should have received two months' extra pay at the rate of $1,700 per annum,

which is the pay for sea service of an assistant engineer in the Navy, and therefore he should have received, as two months' extra pay, the sum of $283.32 instead of $166.66. He here claims $116.66 in addition to the $166.66 heretofore received.

The cause was heard by the court below on the 6th of December, 1905, and on March 12, 1906, the court made findings of fact, conclusion of law, and rendered judgment in favor of the claimant in said sum of $166.66. From the judgment so entered the United States appeals to this court.

THE ISSUE.

The claimant contends that the two months' extra pay provided for in the foregoing statute should be at the rate of pay he received while *doing sea service*, to wit, $1,700 per year.

The contention of the Government is that under the ruling of this court in the cases of North and Emory (112 U. S. R., p. 510) the claimant has been paid all that was due him, inasmuch as he was paid two months' extra pay provided for in the statute at the rate of pay he was receiving *at the time of his discharge*, to wit, at the rate of $1,000 per annum.

ARGUMENT.

During the interval of time between December 17, when claimant was detached from the battle ship *Massachusetts*, and December 22, when he was discharged from the service, a period of five days, he was not performing sea service, but was on leave or waiting-orders pay, and therefore was entitled to

compensation during such time at the rate of $1,000 a year.

The language of the statute is "shall be paid two months' extra pay," evidently meaning the same pay he would have received if he had remained in the same service two months longer, and if the claimant had remained in the same service two months longer he would have received and been paid compensation at the rate of $1,000 per year, which was leave or waiting-orders pay. And this is the construction given to a like statute in the case of *United States* v. *North* and *United States* v. *Emory* (112 U. S. R., p. 510). Quoting from the opinion, Chief Justice Waite said:

> The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is "shall be entitled to receive three months' extra pay," evidently meaning the same pay they would have received if they had remained in the same service three months longer.
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> (See report cited, p. 513.)

It is true that the claimant was in the kind of service for which smaller rate of pay is granted the short period of five days. But this fact does not interfere with the principle. Had he continued in service "on leave or waiting-orders pay" from the time he was detached from the *Massachusetts* for a period of several months he would have been entitled to compensation at the rate of $1,000 per year, and at the end of a year or any other period

of such service, if discharged, he would have as much right or reason to contend for the two months' extra pay based on his *former sea pay* as he has for the present contention.

Two of the judges of the court below did not concur in the prevailing opinion in this case. Judge Atkinson wrote the dissenting opinion, in which Judge Howry concurred. It presents a clear and comprehensive statement, together with an able discussion of the issue involved. For the sake of convenience we here insert the dissenting opinion:

> ATKINSON, J., dissenting.
>
> I regret that I can not concur in the opinion of the court in this case, for the reason that it appears inequitable not to do so; but it seems to me that it so clearly comes within the decisions of this court and the Supreme Court of the United States, in cases where the same principle is involved, that I feel it to be my duty to dissent.
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> The act of March 3, 1899 (30 Stat. L., 1228), under which this suit is instituted, reads as follows:
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> "The officers and enlisted men comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

This suit, therefore, was brought by reason of the rejection of the claimant's claim for two months' sea-service pay by the accounting officers of the Treasury and allowing him only waiting-orders pay. The rejection was based upon a ruling of the Auditor for the Navy Department made March 8, 1899, construing said act as modified by a decision of the Assistant Comptroller of the Treasury made March 11, 1899 (5 Comp. Dec., 559).

The Assistant Comptroller held that the *rate* of pay contemplated by the Congress was according to the kind of service the officer or enlisted man was engaged in performing *at the time of his discharge.* His conclusion was based upon the decision of the Supreme Court of the United States in the cases of the *United States* v. *North* and *Emory* (112 U. S. R., 510).

No question is raised before us as to the right or duty of the Government to pay claimant the two months' extra pay provided for by the statute above quoted; but the question referred to the court, and upon which a decision is asked, is whether claimant should be paid "sea-service" pay, which is at the rate of $1,700 per annum, or "shore" or "waiting-orders" pay, which is only at the rate of $1,000 per annum allowed to officers of the rank of the claimant in this case, while he is not engaged "at sea" or in "sea service."

Claimant's counsel contends that the decision of the Supreme Court in the North and Emory cases, *supra,* is that the court did not have before it any question as to the rate of pay intended by the acts giving extra pay to

those officers who had served in the Mexican war in the military and naval service of the United States, and that therefore there is a material difference between that case and the case at bar. I have carefully examined the facts in that case, because it seemed to me harsh and apparently unjust to the claimant in the case before us that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service. Five days thereafter he was honorably discharged, and after his discharge he was paid at the rate of $1,000 per year, which was the pay allowed under the statute while he was "waiting orders." Equity seems to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty;" but the statute before us, which is somewhat ambiguous, does not define in plain terms whether an officer discharged under such circumstances shall be paid on the basis of "sea pay," "shore pay," or "waiting-orders pay;" yet the decision in the North and Emory cases, *supra*, is in no respect ambiguous, as I read it, and it is, therefore, our duty to be guided by it.

In the cases of *Emory and North* v. *The United States* (19 C. Cls. R., 270) the court said:

* * * * *

"The court has no power to legislate as to what grade of pay naval officers shall now receive. It can not decree that an officer wait-

ing orders shall recover sea-service pay or that an officer on sea service shall recover waiting-orders pay. But inasmuch as Congress went to the act of 1848 when enacting that naval officers shall receive three months' extra pay, the court may go there for a like purpose and carry out the analogy which the act of 1879 instituted. We therefore hold that the pay which a naval officer was receiving when his service in the war with Mexico ended furnishes the standard by which his three months' extra pay must be computed. If he was then on sea service, it will be sea-service pay; if he was on other duty, it will be other-duty pay; if he was on waiting orders, it will be waiting-orders pay; if he was a lieutenant commanding, it will be a lieutenant's pay when commanding; if he was a lieutenant on other duty, it will be simply a lieutenant's pay. As to the point of time in the period of an army or navy officer's service which shall be taken as equivalent to the muster out of the volunteers—the time at which his rank must be ascertained and extra pay must be computed—we are of the opinion that it should be the time when his '*actual service during the war*' ceased. In the case of volunteer officers that time was definitely fixed by the event of their muster out. They served in the war with Mexico not till the signing of the treaty, not till the exchange of ratifications, not till the passage of the act giving them three months' extra pay, but until they had 'served out the term of their engagements,' as evidenced by their muster out."

These cases were appealed to the Supreme Court of the United States, and the decision of this court was affirmed as stated above. The Supreme Court not only had before it in review the various acts of Congress bearing upon the point in issue but it also had before it the opinion of the Court of Claims as well, which is exhaustive and convincing, and which explicitly holds, in language which can not be mistaken or misconstrued, that the time from which the extra pay must be reckoned is not from the date of the signing of the treaty of peace, but it must be when the soldier's actual service ceased, which time is definitely fixed by the date that he was mustered out of the Army or the Navy.

It is plainly evident to my mind that Chief Justice Waite, in passing upon these same cases on appeal, sustained the views expressed by the Court of Claims when the language following was used by him:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers his pay must be in accordance with that rank."

What are we to infer was the intent of the Supreme Court in the language above quoted when read in connection with the decision of the Court of Claims, which it was then reviewing? Did it intend to hold that the officer's pay was to be computed from the time of the signing of the treaty of peace? It does not say so. But it does say that it was "at the end of their engagement," which in the case of both Emory and North was at the time "*when they were honorably discharged.*"

The claimant in the case at bar, however, is not in every respect on all fours with the cases of Emory and North. The claimant Hite in the case before us was not detached from his ship until after the treaty of peace was signed with Spain, and five days subsequent to the receipt of such order he was honorably discharged from the service of the United States Navy. It is clearly evident that the court meant to convey the idea, the same as it was expressed by the Court of Claims, that the engagement of the officers could not be completed until they were regularly mustered out of the service.

If this were a matter of first impression, the exceptional circumstances which the court thinks should bring this case within the *spirit of the statute* might prevail. But neither this court nor the Supreme Court has construed the statute to mean anything more than its language implies.

The Supreme Court in the Emory and North cases, *supra*, in construing the act of 1848, held that the rate of pay an officer should receive

must be the pay pertaining to the character of duty he was performing at the time of his discharge. Applying this construction to the act of March 3, 1899, which is in fact a practical reproduction of the act of 1848, we should hold in the case at bar, although in a sense it bears the mark of harshness, that the petition of the claimant should be dismissed.

I am authorized to state that Howry, J., concurs in this dissent.

THE EQUITIES.

It is probably unnecessary to present further argument than is contained in the foregoing able opinion, but in view of the suggestions that the equities are with the claimant we desire to remind the court that the Government has equities which seem to appeal with great force to the mind of the interpreter of the statute.

The claimant was appointed and commissioned as an assistant engineer in the temporary force of the Navy May 14, 1898. (Rec., p. 1.) At the time of his appointment he knew just what his compensation would be as then provided by law. It was his privilege to refuse the appointment if not satisfied with the pay provided for his services. He had no right to expect and did not contemplate that the Congress would subsequently make provisions for a gratuity to be presented him at the end of his service.

The statute granting him two months' extra pay was approved March 3, 1899, about two months and a half after he was discharged from the service and

nearly ten months after claimant's appointment. The provision for extra pay was therefore a gratuity granted by Congress and for which the Government was in no way liable under its contract with the claimant. It therefore does not seem equitable that he should receive the gratuity of two months' extra pay based upon his sea pay while rendering service beyond the limits of the United States.

This is what is commonly termed a "class case," and it is one of the most favorable of the class for the claimants. There are a large number of claims which will be affected by the decision of the court in the case at bar, and that decision will serve as a standard whereby the Court of Claims and the accounting officers of the Navy Department may measure the compensation due other officers making similar demands to that of claimant.

In view of the foregoing we ask that the judgment rendered by the Court of Claims be reversed.

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